

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

## SEATTLEHAUNTS, LLC,

CASE NO. C19-1937JLR

Plaintiff,

## ORDER ON MOTIONS TO DISMISS AND TO STRIKE

THOMAS FAMILY FARM, LLC, et al.,

## Defendants.

## I. INTRODUCTION

Before the court are (1) Plaintiff Seattlehaunts, LLC (“Seattlehaunts”) motion to dismiss several of Defendant Thomas Family Farm, LLC’s (“Thomas Family” or “Thomas Family Farm”) counterclaims and strike Thomas Family’s affirmative defenses (Seattlehaunts Mot. (Dkt. # 22)); and (2) Third-Party Defendant Joseph Wondell’s motion to dismiss several of Thomas Family’s claims against him (Wondell Mot. (Dkt. # 23)).

11

1 # 23)).<sup>1</sup> Thomas Family opposes both motions. (Resp. to Seattlehaunts Mot. (Dkt. # 24);  
 2 Resp. to Wondell Mot. (Dkt. # 26).) The court has considered the motions, the parties'  
 3 submissions in support of and in opposition to the motions, the relevant portions of the  
 4 record, and the applicable law. Being fully advised,<sup>2</sup> the court GRANTS in part and  
 5 DENIES in part Seattlehaunts' motion and GRANTS Mr. Wondell's motion.

6 **II. BACKGROUND**

7 **A. Factual Background**

8 This is an intellectual property dispute.<sup>3</sup> Thomas Family owns and runs a  
 9 commercial amusement park on farm property located on Highway 9 in Snohomish,

10 \_\_\_\_\_  
 11 <sup>1</sup> The parties repeatedly refer to Thomas Family's claims against Mr. Wondell as  
 12 "counterclaims." (See, e.g., Wondell Mot. at 1; Resp. to Wondell Mot. at 1.) However, because  
 13 Mr. Wondell is not a plaintiff, but rather a third-party defendant, Thomas Family's claims  
 14 against him are properly referred to as third-party claims. (See Dkt.; see also Fed. R. Civ. P. 13,  
 15 14.)

16 <sup>2</sup> Seattlehaunts and Mr. Wondell do not request oral argument (Seattlehaunts Mot. at 1;  
 17 Wondell Mot. at 1), but Thomas Family requests oral argument on both motions (Resp. to  
 18 Seattlehaunts Mot. at 1; Resp. to Wondell Mot. at 1.) Oral argument is not necessary where the  
 19 non-moving party suffers no prejudice. *See Houston v. Bryan*, 725 F.2d 516, 517-18 (9th Cir.  
 20 1984); *Mahon v. Credit Bureau of Placer Cty. Inc.*, 171 F.3d 1197, 1200 (9th Cir. 1999) (holding  
 21 that no oral argument was warranted where "[b]oth parties provided the district court with  
 22 complete memoranda of the law and evidence in support of their respective positions," and "[t]he  
 only prejudice [the defendants] contend they suffered was the district court's adverse ruling on  
 the motion."). "When a party has an adequate opportunity to provide the trial court with  
 evidence and a memorandum of law, there is no prejudice [in refusing to grant oral argument]."  
*Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998) (quoting *Lake at Las Vegas Investors Grp., Inc. v. Pac. Malibu Dev. Corp.*, 933 F.2d 724, 729 (9th Cir. 1991)) (alterations in *Partridge*).  
 Here, the issues have been thoroughly briefed by the parties, and oral argument would not be of  
 assistance to the court. *See* Local Rules W.D. Wash. LCR 7(b)(4). Accordingly, the court  
 DENIES Thomas Family's requests for oral argument.

23 <sup>3</sup> The court set forth Seattlehaunts' relevant alleged facts in adjudicating Thomas Family  
 24 Farm's prior motion to dismiss. (See 4/6/20 Order (Dkt. # 18) at 2-6.) On the present motions,  
 25 because Thomas Family is the nonmoving party, the court accepts Thomas Family's  
 26 well-pleaded factual allegations as true and draws all reasonable inferences in favor of Thomas

1 Washington (“the Farm”). (Countercl. (Dkt. # 19) ¶¶ 8-9.)<sup>4</sup> In April 2011, Thomas  
 2 Family began to develop a commercial haunted house attraction on the Farm and created  
 3 the name “Nightmare on 9” for the event. (*Id.* ¶¶ 10-11.) Thomas Family created the  
 4 following graphic for “Nightmare on 9”:



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 11 (*Id.* ¶ 12 (“Hook Graphic”).) In 2012, Thomas Family and Seattlehaunts entered into an  
 12 agreement to jointly put on the Nightmare on 9 event (“the Event” or “Nightmare on 9”).  
 13 (*Id.* ¶ 15.)

14 Thomas Family alleges that it hired and paid a commercial designer, Mr. Wondell  
 15 “to improve” the Hook Graphic created by Thomas Family. (*Id.* ¶ 16.) According to  
 16 Thomas Family, Mr. Wondell created the following graphic:

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18 //

19  
 20 Family. Accordingly, the court relies on the alleged facts in Thomas Family’s counterclaim (*see*  
 21 *generally* Countercl.) in setting forth the background in this order.

22  
 23 <sup>4</sup> The court cites to the portion of Thomas Family’s answer and counterclaim that  
 contains its counterclaims as “Countercl.” and the portion that contains its answer as “Ans.”



(*Id.* ¶ 17 (“Original Wondell Graphic”).)

In 2013, Thomas Family hired Seattlehaunts annually as an independent contractor to present, set up, and run the Nightmare on 9 event at the Farm. (*Id.* ¶ 19; *see also* Jacobowitz Decl. (Dkt. # 9) ¶ 2, Ex. 1 (“State Court Compl.”) ¶ 16, Ex. H (“Contract”).) The parties’ contract for 2014 refers to “apparel . . . with Thomas Family Farm’s trademarked ‘Nightmare on 9’ on them.” (Countercl. ¶ 20.) The same contract states that Thomas Family and Seattlehaunts would “[a]t this time . . . share the copyright and trademark to ‘Nightmare on 9.’” (*Id.* ¶ 21.) Seattlehaunts operated a “Nightmare on 9 Haunted House” Facebook page. (*Id.* ¶ 22.) On one occasion, Seattlehaunts posted on the Facebook page that the Nightmare 9 event is “also known as Thomas Family Farm.” (*Id.* ¶ 25.)

In 2018, Thomas Family registered the name “Nightmare on 9” with the Hook Graphic in classifications 16 and 31 as a trademark with the Washington Secretary of

1 State's office. (*Id.* ¶ 28.) In 2019, Seattlehaunts asked for a greater share of the revenue  
2 from the Nightmare on 9 event. (*Id.* ¶ 30.) Subsequently, Thomas family decided not to  
3 work with Seattlehaunts on the Nightmare on 9 event. (*Id.* ¶ 31.) Also in 2019, Thomas  
4 Family discovered that Seattlehaunts was advertising through Facebook and its website  
5 that the Nightmare on 9 event would not be taking place in 2019 and was no longer  
6 associated with Thomas Family or the Farm. (*Id.* ¶ 32; Countercl. Ex. A.) Seattlehaunts  
7 advertised the Nightmare on 9 event using a revised version of the Original Wondell  
8 Graphic ("Revised Wondell Graphic"). (*Id.* ¶ 34.) According to Thomas Family,  
9 Seattlehaunts profited from the Nightmare on 9 event after advertising it using the  
10 Revised Wondell Graphic. (*Id.* ¶ 35.) On August 13, 2019, Thomas Family sent a cease  
11 and desist letter to Seattlehaunts including demands that Seattlehaunts rejected. (*Id.*  
12 ¶¶ 36, 38; Countercl. Ex. B.)

13 Seattlehaunts subsequently attempted to register the Revised Wondell Graphic as a  
14 trademark. (*Id.* ¶ 40.) Seattlehaunts also contacted Mr. Wondell to obtain copyright  
15 rights in the Revised Wondell Graphic, which Mr. Wondell purported to assign to  
16 Seattlehaunts on August 15, 2019. (*Id.* ¶¶ 41, 45.) On August 16, 2019, Seattlehaunts  
17 registered a copyright to the Revised Wondell Graphic with the United States Patent and  
18 Copyright Office ("the Copyright Office"). (*Id.* ¶ 50.) In its copyright application,  
19 Seattlehaunts listed Mr. Wondell as the sole author of the Revised Wondell Graphic. (*Id.*  
20 ¶ 51.) Seattlehaunts then demanded that Thomas Family rename or discontinue the  
21 Nightmare on 9 event (*id.* ¶ 56) and informed Thomas Family that it claimed copyright in  
22 the Revised Wondell Graphic (*id.* ¶ 57). According to Thomas Family, that was the first

1 time Seattlehaunts had given Thomas Family notice that it claimed any intellectual  
2 property rights in the Revised Wondell Graphic. (*Id.* ¶ 59.) Seattlehaunts has also  
3 retained control of the Nightmare on 9 Haunted House Facebook page. (*Id.* ¶ 60.) On  
4 September 17, 2019, Seattlehaunts posted on the Facebook page that Thomas Family:

5 decided to go ahead and do it on their own, saying that they're Nightmare on  
6 9. That's misleading the public. Instead of informing the public that they're  
7 going to start their own haunted attraction they have taken our logo and our  
8 name.

9 (*Id.* ¶ 63, Countercl. Ex. C.)

10 **B. Procedural Background**

11 On October 7, 2019, Thomas Family Farm filed a lawsuit against Seattlehaunts in  
12 Snohomish County Superior Court, *Thomas Family Farm, LLC v. Seattlehaunts, LLC*,  
13 Cause No. 19-2-09008-31 (the “State Court Action”). (See Am. Compl. ¶ 9; State Court  
14 Compl.) In that lawsuit, Thomas Family Farm brings claims for state trademark  
15 infringement and defamation against Seattlehaunts. (See FAC ¶ 9; State Court Compl. at  
16 5-7.) Seattlehaunts filed this lawsuit against Thomas Family Farm on November 26,  
17 2019 (see Compl. (Dkt. # 1) at 17) and amended the complaint on December 18, 2019  
18 (see FAC at 21). Seattlehaunts brings claims for (1) unregistered trademark infringement  
19 and false designation or origin under the Lanham Act, 15 U.S.C § 1125; (2) Copyright  
20 Infringement under 17 U.S.C. § 101; (3) unfair competition under the Washington  
21 Consumer Protection Act, RCW ch. 19.86; (4) declaratory judgment of non-infringement;  
22 (5) declaratory judgment of abandonment; and (6) declaratory judgment of  
non-disparagement. (See FAC ¶¶ 50-79.)

1 Thomas Family moved to dismiss several of Seattlehaunts' claims. (See TFF  
 2 MTF (Dkt. # 8).) The court denied that motion. (4/6/20 Order (Dkt. # 18).) Thomas  
 3 Family Farm then filed an answer and counterclaim, alleging counterclaims against  
 4 Seattlehaunts and third-party claims against Mr. Wondell. (See Countercl. ¶¶ 69-157.)  
 5 Thomas Family's answer also includes the following description of its affirmative  
 6 defenses:

- 7 80. Invalid copyright.
- 8 81. Fraud on Copyright Office.
- 9 82. Innocent infringement.
- 10 83. Common source.
- 11 84. Unclean hands.
- 12 85. Lack of originality.
- 13 86. Abandonment of copyright.
- 14 87. Laches, waiver, and/or estoppel.
- 15 88. Statute of limitations.
- 16 89. Setoff and/or recoupment.
- 17 90. All matters asserted herein as counterclaims are raised as defenses.

18 (Ans. ¶¶ 80-90.)

19 Seattlehaunts and Mr. Wondell separately filed the present motions. (See  
 20 Seattlehaunts Mot.; Wondell Mot.) Seattlehaunts' motion asks the court to (1) dismiss  
 21 Thomas Family's claims for tortious interference and civil conspiracy as preempted by 17  
 22 U.S.C. § 301(a) of the Copyright Act of 1976 (the "Copyright Act"); (2) dismiss Thomas  
 Family's claims for fraud, negligent misrepresentation, and breach of fiduciary duty  
 under Federal Rule of Civil Procedure 12(b)(6); and (3) strike each of Thomas Family's  
 affirmative defenses. (Seattlehaunts Mot. at 5.) Mr. Wondell's motion asks the court to  
 dismiss three of Thomas Family's third-party claims against him. (Wondell Mot. at 4.)  
 The court now considers these motions.

### III. ANALYSIS

## A. Legal Standards

## 1. Motions to Dismiss

Rule 12(b)(6) provides for dismissal for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). When considering a motion to dismiss under Rule 12(b)(6), the court construes the complaint in the light most favorable to the nonmoving party. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). The court must accept all well-pleaded facts as true and draw all reasonable inferences in favor of the plaintiff. *Wyler Summit P’ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). The court, however, is not required “to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 677-78. “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’ . . . Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* at 678 (quoting *Twombly*, 550 U.S. at 555, 557).

1      2. Motions to Strike

2      Federal Rule of Civil Procedure 8(c)(1) requires a party, in responding to a  
 3      pleading, to “affirmatively state any avoidance or affirmative defense.” Fed. R. Civ. P.  
 4      8(c)(1). A court may, on its own or on a motion, strike an affirmative defense under  
 5      Federal Rule of Civil Procedure 12(f) if it is “insufficient” or presents “any redundant,  
 6      immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). An affirmative  
 7      defense may be insufficient as a matter of pleading or as a matter of law. *Cobra Sys., Inc.*  
 8      *v. Unger*, No. 8:16-cv-00569-ODW-JEM, 2016 WL 9383517, at \*1 (C.D. Cal. Aug. 4,  
 9      2016). An affirmative defense is insufficiently pleaded if it fails to provide the plaintiff  
 10     “fair notice” of the defense asserted. *Wyshak v. City Nat'l Bank*, 607 F.2d 824, 827 (9th  
 11     Cir. 1979), *abrogated in part on other grounds by Castro v. Cty. of Los Angeles*, 833 F.3d  
 12     1060 (9th Cir. 2016) (en banc)).

13      In general, courts disfavor motions to strike, given the strong policy preference for  
 14     resolving issues on the merits. *See, e.g., Chao Chen v. Geo Grp., Inc.*, 297 F. Supp. 3d  
 15     1130, 1132 (W.D. Wash. 2018). Nonetheless, “where [a] motion [to strike] may have the  
 16     effect of making the trial of the action less complicated, or have the effect of otherwise  
 17     streamlining the ultimate resolution of the action, the motion to strike will be well taken.”  
 18     *California v. United States*, 512 F. Supp. 36, 38 (N.D. Cal. 1981). Indeed, the function of  
 19     Rule 12(f) is “to avoid the expenditure of time and money that must arise from litigating  
 20     spurious issues by disposing of those issues prior to trial. . . .” *Whittlestone, Inc. v.*  
 21     *Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (quoting *Fantasy, Inc. v. Fogerty*,  
 22     984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other grounds*, 510 U.S. 517 (1994)).

1     Whether to grant a motion to strike lies within the discretion of the district court. *Cal.*  
 2     *Dep’t of Toxic Substances Control v. Alco Pac., Inc.*, 217 F. Supp. 2d 1028, 1033 (C.D.  
 3     Cal. 2002)). When considering a motion to strike, the court must view the pleadings in  
 4     the light most favorable to the pleading party. *See, e.g., In re 2TheMart.com Secs. Litig.*,  
 5     114 F. Supp. 2d 955, 965 (C.D. Cal. 2000).

6     **B. Seattlehaunts’ Motion**

7       1. Preemption

8       Seattlehaunts moves the court to dismiss Thomas Family’s claims for tortious  
 9     interference and civil conspiracy as preempted by the Copyright Act. (Seattlehaunts Mot.  
 10    at 10.) Specifically, Seattlehaunts contends that Thomas Family’s tortious interference  
 11    and civil conspiracy claims rely on the same factual allegations made in Thomas  
 12    Family’s copyright infringement claim. (*Id.*)

13       The Copyright Act expressly preempts state claims where (1) the plaintiff’s work  
 14    “come[s] within the subject matter of copyright” and (2) the state law grants “legal or  
 15    equitable rights that are equivalent to any of the exclusive rights within the general scope  
 16    of copyright.” 17 U.S.C. § 301(a). Claims, however, “are not preempted if they fall  
 17    outside the scope of § 301(a)’s express preemption and are not otherwise in conflict with  
 18    the Act.” *Ryan v. Editions Ltd. West.*, 786 F.3d 754, 760 (9th Cir. 2015). With respect to  
 19    the second prong, “a state cause of action must assert rights that are qualitatively different  
 20    from the rights protected by copyright.” *Montz v. Pilgrim Films & Television, Inc.*, 649  
 21    F.3d 975, 980 (9th Cir. 2011). “A state cause of action is ‘qualitatively different’ when it

22    //

1 contains an additional element not required for a copyright claim.” *Ryan*, 786 F.3d at  
 2 760.

3                   *a. Tortious Interference*

4                   A tortious interference claim in Washington contains five elements: “(1) the  
 5 existence of a valid contractual relationship or business expectancy; (2) the defendant’s  
 6 knowledge of and intentional interference with that relationship or expectancy; (3) a  
 7 breach or termination of that relationship or expectancy induced or caused by the  
 8 interference; (4) an improper purpose or the use of improper means by the defendant that  
 9 caused the interference; and (5) resultant damage.” *Tamosaitis v. Bechtel Nat’l, Inc.*, 327  
 10 P.3d 1309, 1313 (Wash. Ct. App. 2014) (quoting *Eugster v. City of Spokane*, 91 P.3d 117,  
 11 123 (Wash. Ct. App. 2004)).

12                   Thomas Family’s tortious interference counterclaim against Seattlehaunts is based  
 13 on the allegations that “[Mr.] Wondell licensed the Logo to Thomas Family” and that  
 14 Seattlehaunts “interfered with this license and with Thomas Family Farm’s reasonable  
 15 expectation that this license would continue, by impelling [Mr.] Wondell to terminate or  
 16 purport to terminate the license.” (Countercl. ¶¶ 100-02.) The asserted right in Thomas  
 17 Family’s tortious interference claim is the right to its contractual arrangement with Mr.  
 18 Wondell, not its intellectual property rights in the Revised Wondell Graphic. Thus,  
 19 Thomas Family’s asserted state law right is “qualitatively different than rights protected  
 20 by copyright.” *See Montz*, 649 F.3d at 980-81 (holding that “copyright law does not  
 21 preempt an implied contractual claim to compensation for use of a submitted idea” and  
 22 noting that “[c]ontract claims generally survive preemption because they require proof of

1 an extra element.”). Although Thomas Family’s tortious interference claim is distinct  
 2 from a breach of contract claim, it rests on Thomas Family’s right against improper  
 3 interference with its contractual arrangement with Mr. Wondell. Accordingly, the  
 4 Copyright Act does not preempt Thomas Family’s tortious interference claim.

5                   *b. Civil Conspiracy*

6                   Thomas Family alleges a state-law civil conspiracy claim against both  
 7 Seattlehaunts and Mr. Wondell. (Countercl. ¶¶ 150-53.) The factual basis for this claim  
 8 is that Mr. Wondell and Seattlehaunts “agreed to a scheme to falsely register copyright in  
 9 the Derivative Logo, unlawfully, for the further unlawful purpose of infringement on  
 10 Thomas Family Farm’s copyright and Trademarks for commercial gain.” (*Id.* ¶ 151.)  
 11 The Copyright Act preempts this claim. As to the first element, the parties do not dispute  
 12 that “the work at issue”—the Revised Wondell Graphic—“falls within the scope of  
 13 copyright subject matter.” *Montz*, 649 F.3d at 979. As to the second element, and unlike  
 14 the tortious interference claim, the asserted right is Thomas Family’s intellectual property  
 15 rights in the Revised Wondell Graphic. That is the same right at stake in Thomas  
 16 Family’s copyright infringement counterclaims against Seattlehaunts and third-party  
 17 claims against Mr. Wondell. (*See Ans.* ¶¶ 86-98). Accordingly, the Copyright Act  
 18 preempts Thomas Family’s civil conspiracy claim.<sup>5</sup>

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21                   <sup>5</sup> Mr. Wondell also moves to dismiss Thomas Family’s civil conspiracy claim on  
 22 preemption grounds. (*See Wondell Mot.* at 10-11.) For the reasons stated herein, the court also  
 grants Mr. Wondell’s motion to dismiss Thomas Family’s civil conspiracy claim.

1      2. Failure to State a Claim

2      Seattlehaunts moves to dismiss Thomas Family's counterclaims for fraud,  
 3      negligent misrepresentation, and breach of fiduciary duty for failure to state a claim under  
 4      Federal Rule of Civil Procedure 12(b)(6). (See Seattlehaunts Mot. at 12-16.) Thomas  
 5      Family's counterclaims for fraud and negligent misrepresentation sound in fraud and are  
 6      therefore subject to the heightened pleading standards of Rule 9(b). *See* Fed. R. Civ. P.  
 7      9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances  
 8      constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a  
 9      person's mind may be alleged generally."); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d  
 10     1097, 1103 (9th Cir. 2003) (noting that Rule 9(b)'s particularity requirement applies to all  
 11     state law causes of action that "sound in fraud"). Under Rule 9(b), "a party must state  
 12     with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b).  
 13     Thus, to avoid dismissal under Rule 9(b), a claim sounding in fraud must state the time,  
 14     place, and specific content of the false representations as well as the identities of the  
 15     parties to the misrepresentation. *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 558 (9th  
 16     Cir. 2010) (citing *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004)).  
 17     "In alleging fraud . . . , a party must state with particularity the circumstances constituting  
 18     fraud." Fed. R. Civ. P. 9(b); *see also Haberman v. Wash. Pub. Power Supply Sys.*, 744  
 19     P.2d 1032, 1069 (Wash. 1987), *amended*, 750 P.2d 254 (Wash. 1988) ("The complaining  
 20     party must plead both the elements and circumstances of fraudulent conduct."); *Depot,*  
 21     *Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 668 (9th Cir. 2019); *Cooper v. Pickett*,

22     //

1 137 F.3d 616, 627 (9th Cir. 1997); *Macris v. Bank of Am., N.A.*, No. CV F 11-1986 LJO  
 2 SKO, 2012 WL 273120, at \*11 (E.D. Cal. Jan. 30, 2012).

3       Rule 9(b)'s standard is relaxed in fraudulent omission cases. *Carideo v. Dell, Inc.*,  
 4 706 F. Supp. 2d 1122, 1132 (W.D. Wash. 2010) (citing *Falk v. Gen. Motors Corp.*, 496  
 5 F. Supp. 2d 1088, 1098-99 (N.D. Cal. 2007)); *see also Zwicker v. Gen. Motors Corp.*, No.  
 6 C07-0291-JCC, 2007 WL 5309204, at \*4 (W.D. Wash. July 26, 2007). In such cases, a  
 7 plaintiff "will not be able to specify the time, place, and specific content of an omission  
 8 as precisely as would a plaintiff in a false representation claim." *Falk*, 496 F. Supp. 2d at  
 9 1098-99. "Nonetheless, a plaintiff pleading fraudulent omission or concealment must  
 10 still plead the claim with particularity." *Asghari v. Volkswagen Grp. of Am., Inc.*, 42 F.  
 11 Supp. 3d 1306, 1325 (C.D. Cal. 2013); *Waldrup v. Countrywide Financial Corp.*, No.  
 12 2:13-cv-08833-CAS(CWx), 2014 WL 3715131, \*5 (C.D. Cal. July 23, 2014) (holding  
 13 that where a fraudulent omission is at issue, the requirements of Rule 9(b) are relaxed,  
 14 but not eliminated).

15           a. *Fraud*

16       A claim for fraud under Washington law requires a nine-part showing "by clear,  
 17 cogent, and convincing evidence: (1) a representation of existing fact, (2) its materiality,  
 18 (3) its falsity, (4) the speaker's knowledge of its falsity, (5) the speaker's intent that it be  
 19 acted upon by the person to whom it is made, (6) ignorance of its falsity on the part of the  
 20 person to whom the representation is addressed, (7) the latter's reliance on the truth of the  
 21 representation, (8) the right to rely upon it, and (9) consequent damage." *See Elcon*  
 22 *Const., Inc. v. E. Wash. Univ.*, 273 P.3d 965, 970 (Wash. 2012). Seattlehaunts challenges

1 only the adequacy of Thomas Family’s allegations related to the reliance element. (See  
 2 Seattlehaunts Mot. at 8.)

3                   Thomas Family’s fraud claim against Seattlehaunts is based on agreements  
 4 between the parties in which Seattlehaunts allegedly “agreed with Thomas Family Farm,  
 5 in writing, that the two entities would temporarily share the copyright and trademark to  
 6 ‘Nightmare on 9,’ even though “Seattlehaunts then knew or believed that neither party  
 7 owned the copyright and/or trademark to ‘Nightmare on 9.’” (Countercl. ¶¶ 105, 107.)  
 8 Thomas Family further alleges that Seattlehaunts “made these false statements or  
 9 misleading omissions with the intent to induce Thomas Family Farm to enter into  
 10 contracts with Seattlehaunts under which, among other things, Seattlehaunts collected  
 11 75% of gross sales tickets.” (*Id.* ¶ 108.)

12                   Seattlehaunts argues that Thomas Family “plead[ed] itself out of its claim[] for  
 13 fraud” in two ways. (*See* Seattlehaunts Mot. at 14-15.) First, Seattlehaunts argues that  
 14 Thomas Family “never alleged that it approached or hired Seattlehaunts for its skills in  
 15 determining the ownership of any intellectual property rights.” (*Id.* at 15.) Second,  
 16 Seattlehaunts argues that “the counterclaims go on to allege that [Thomas Family] itself  
 17 obtained rights in the trademark in 2018 before issues arose between the parties, a  
 18 situation that undercuts any assertion by [Thomas Family] that it relied upon statements  
 19 by Seattlehaunts when it abstained from obtaining IP rights related to the Nightmare on 9  
 20 event.” (*Id.* (italics omitted).)

21                   In response, Thomas Family points to the “same document” in which  
 22 “Seattlehaunts expressly refers to the [Revised Wondell Graphic] as ‘Thomas Family

1 Farm's trademarked 'Nightmare on 9,'" a statement Thomas Family argues was  
2 "calculated to assure [Thomas Family] that Seattlehaunts understood [Thomas Family] to  
3 have the rights." (Resp. to Seattlehaunts Mot. at 13.) In reply, Seattlehaunts argues that  
4 the contract provision to which Thomas Family points "is not a statement that  
5 Seattlehaunts made but rather a provision that was incorporated into the agreement  
6 reached as the result of arms' length negotiations." (Seattlehaunts Reply (Dkt. # 25) at  
7 9.)

8 The court does not find persuasive Seattlehaunts' argument that a claimant can  
9 properly allege the reliance element of a fraud claim regarding intellectual property rights  
10 if the speaker of the allegedly false statement is "a specialist in intellectual property law."  
11 (See Seattlehaunts Mot. at 14-15.) Seattlehaunts cites to no authority for this proposition.  
12 Moreover, Seattlehaunts' argument about the timing of when Thomas Family sought to  
13 obtain intellectual property rights in "Nightmare on 9" invites to court to weigh into a  
14 factual dispute, which is improper on a Rule 12(b)(6) motion. *See Wyler Summit P'ship*,  
15 135 F.3d at 661.

16 However, Seattlehaunts' argument that Thomas Family could not have relied on a  
17 provision in the parties' contract as a false statement by Seattlehaunts because it is a  
18 "mutual statement" is more persuasive. In contrast to a fraudulent inducement claim, in  
19 which a party alleges that a false statement induced that party to enter a contract they  
20 otherwise would not have entered, *see, e.g., Elcon Const., Inc.*, 173 P.3d at 970, here,  
21 Thomas Family alleges that the parties' agreed contract provision *itself* is a false  
22 statement made by Seattlehaunts to Thomas Family. (See Countercl. ¶ 105; Resp. to

1 Seattlehaunts Mot. at 12-13.) The alleged contract provision is not a statement made by  
2 Seattlehaunts and addressed to Thomas Family, but rather a mutually agreed term in a  
3 contract between the parties. (See Countercl. ¶ 105.) Indeed, Thomas family's  
4 counterclaim specifically alleges that Seattlehaunts "repeatedly agreed with Thomas  
5 Family Farm, in writing," that the parties would temporarily share the intellectual  
6 property rights to "Nightmare on 9." (*Id.*) In Thomas Family's telling, this contract  
7 implies that one or both of the parties owned the copyright and trademark. (*Id.*)  
8 However, if there was any such implication, it was mutual, because according to Thomas  
9 Family's allegations, both parties agreed to this language. (*Id.*)

10         Accordingly, Thomas Family fails to state a claim for fraud against Seattlehaunts  
11 because it fails to allege a false statement made by Seattlehaunts upon which Thomas  
12 Family relied. *See Elcon Const.*, 273 P.3d at 970. Therefore, the court GRANTS  
13 Seattlehaunts' motion to dismiss with respect to Thomas Family's fraud claim with leave  
14 to amend. Thomas Family's amended complaint must, at a minimum, include allegations  
15 of a false statement or statements made specifically by Seattlehaunts.

16             b. *Negligent Misrepresentation*

17         Seattlehaunts moves to dismiss Thomas Family's negligent misrepresentation  
18 counterclaim on the grounds that the parties did not have a fiduciary or other special  
19 relationship that triggers a duty to disclose, and that Seattlehaunts could not have  
20 reasonably relied on any misrepresentations or omissions because Thomas Family  
21 separately alleges that it obtained trademark rights in 2018 before issues arose between  
22 the parties. (See Seattlehaunts Mot. at 14-16.) To state a counterclaim for negligent

1 misrepresentation, Thomas Family must allege the following elements: (1) Seattlehaunts  
2 supplied information for the guidance of others in their business transaction that was  
3 false; (2) Seattlehaunts knew or should have known that the information was supplied to  
4 guide the plaintiff in his or her business transaction; (3) Seattlehaunts was negligent in  
5 obtaining or communicating the false information; (4) Thomas Family relied on the false  
6 information supplied by the Seattlehaunts; (5) Thomas Family's reliance on the false  
7 information supplied by the Seattlehaunts was justified (that is, the reliance was  
8 reasonable under the surrounding circumstances); and (6) the false information was the  
9 proximate cause of the Thomas Family's damages. *ESCA Corp. v. KMPG Peat Marwick*,  
10 959 P.2d 651, 654 (Wash. 1988). "The duty to disclose in a business transaction arises if  
11 imposed by a fiduciary relationship or other similar relationship of trust or confidence or  
12 if necessary to prevent a partial or ambiguous statement of facts from being misleading."  
13 *Van Dinter v. Orr*, 138 P.3d 608, 610 (Wash. 2006).

14 A portion of Thomas Family's negligent misrepresentation claim relies on the  
15 same contract provision upon which Thomas Family relies to support its fraud claim.  
16 (See Countercl. ¶¶ 114-16.) This provision, standing alone, fails to allege a negligent  
17 misrepresentation claim for a similar reason that it fails to support a fraud claim: the  
18 alleged contract provision is not information "supplied" by Seattlehaunts, but rather a  
19 mutually agreed contract term.

20 However, Thomas Family's negligent misrepresentation claim also alleges that "as  
21 a partner of Thomas Family Farm in 2012, Seattlehaunts had a duty to inform" Thomas  
22 Family "that the intellectual property rights to 'Nightmare on 9' had not been acquired

1 from [Mr.] Wondell” but failed to do so, and conducted itself “as if the rights had been  
 2 acquired.” (*Id.* ¶ 117.) In doing so, Thomas Family alleges that Seattlehaunts “made  
 3 these false statements or misleading omissions with the intent to induce Thomas Family  
 4 Farm to enter into contracts with Seattlehaunts under which, among other things,  
 5 Seattlehaunts collected 75% of gross sales of tickets.” (*Id.* ¶ 118.)

6 Seattlehaunts argues that Thomas Family fails to state a negligent  
 7 misrepresentation claim because Thomas Family separately alleges that after 2012, the  
 8 first year the parties worked together on the Nightmare on 9 event, Thomas Family “hired  
 9 Seattlehaunts annually as an independent contractor to present, setup, and run the Event  
 10 at the Thomas Family Farm.” (Seattlehaunts Mot. at 15 (citing Countercl. ¶ 19).) Thus,  
 11 according to Seattlehaunts, Thomas Family’s allegations mean that any alleged  
 12 partnership or other special relationship “had dissolved by the end of the 2012 Halloween  
 13 season,” and certainly before any alleged misrepresentations or omissions occurred. (*Id.*)  
 14 In response, Thomas Family urges the court to “not make that assumption,” especially  
 15 because if partners “continue the business without any settlement or liquidation of the  
 16 partnership, they are presumed to have agreed that the partnership will continue.” (*See*  
 17 Resp. to Seattlehaunts Mot. at 15 (quoting RCW 25.05.175(2)).)

18 Here, Thomas Family appears to make two contradictory factual allegations:  
 19 First, that Thomas Family and Seattlehaunts were engaged in a partnership from 2013  
 20 onward, and second, that Thomas Family hired Seattlehaunts annually as an independent  
 21 contractor from 2013 onward. Although parties may generally plead in the alternative,  
 22 courts “are not required to accept as true conclusory allegations which are contradicted

1 by documents referred to in the complaint.” *Steckman v. Hart Brewing, Inc.*, 143 F.3d  
 2 1293, 1295-96 (9th Cir. 1998). Moreover, Thomas Family’s counterclaim does not allege  
 3 facts that, taken as true, lead to a reasonable inference of a special relationship that would  
 4 trigger a duty to disclose once Seattlehaunts’ relationship with Thomas Family became  
 5 that of an independent contractor. Even in an omissions case, a claimant must still “plead  
 6 the claim with particularity.” *Asghari*, 42 F. Supp. 3d at 1325. Thomas Family’s  
 7 allegations with respect to its negligent misrepresentation claim fail to do so.

8 Accordingly, the court GRANTS Seattlehaunts’ motion to dismiss with respect to  
 9 Thomas Family’s negligent misrepresentation counterclaim with leave to amend. In an  
 10 amended counterclaim, Thomas Family must state with particularity alleged facts from  
 11 which the court may plausibly infer that the parties shared a special relationship that  
 12 triggers a disclosure duty at the time of the alleged omissions.

13       c. *Breach of Fiduciary Duty*

14 Thomas Family alleges that Seattlehaunts and Thomas Family formed a  
 15 partnership “in putting on the Event in 2012, including but not limited to the development  
 16 of the” Revised Wondell Graphic. (Countercl. ¶ 124.) Thomas Family further alleges  
 17 that Seattlehaunts violated its duties to account to the partnership and to refrain from  
 18 self-dealing with the partnership “by acquiring from [Mr.] Wondell intellectual property  
 19 rights which properly belonged to the partnership or the opportunity to acquire which was  
 20 the partnership’s.” (*Id.* ¶ 126.) Thomas Family also alleges that Seattlehaunts violated  
 21 its duty to refrain from competing with the partnership “by competing with Thomas

22 //

1 Family Farm for Nightmare on 9 customers before dissolution of the partnership.” (*Id.*  
 2 ¶ 127.)

3 Thomas Family’s breach of fiduciary duty counterclaim suffers from the same  
 4 defect as its negligent misrepresentation counterclaim. That is, Thomas Family alleges  
 5 that Seattlehaunts’s relationship with Thomas Family was that of a partner (*id.* ¶ 124), but  
 6 also that of an independent contractor (*id.* ¶ 19). Thomas Family urges the court “not to  
 7 make that assumption” that the partnership no longer existed as of 2013. (*See* Resp. to  
 8 Seattlehaunts Mot. at 15.) However, the “assumption” comes from Thomas Family’s  
 9 own pleadings. (*See* Countercl. ¶ 19 (alleging that Thomas Family “hired Seattlehaunts  
 10 annually as an independent contractor to present, setup, and run the Event at the Thomas  
 11 Family Farm”)). Based on these allegations, Thomas Family has failed to plead “factual  
 12 content that allows the court to draw the reasonable inference that the defendant is liable  
 13 for the misconduct alleged.” *Iqbal*, 556 U.S. at 677-78; *see also Sprewell*, 266 F.3d at  
 14 988 (“[Courts] are not required to accept as true conclusory allegations which are  
 15 contradicted by documents referred to in the complaint.”) (quoting *Steckman*, 143 F.3d at  
 16 1295-96).

17 3. Motion to Strike Affirmative Defenses

18 Seattlehaunts moves to strike Thomas Family’s affirmative defenses under Federal  
 19 Rule of Civil Procedure 12(f). (Seattlehaunts Mot. at 16.) Seattlehaunts contends that  
 20 Thomas Family’s affirmative defenses are all insufficient because they are “conclusory”  
 21 and are merely “a list of various legal concepts devoid of any factual allegations.”  
 22 (Seattlehaunts Mot. at 17 (citing Ans. ¶¶ 80-90).) The court concludes that Thomas

1 Family's fifth, and eighth through eleventh, affirmative defenses are insufficient, but the  
2 remainder are not. The court addresses each grouping of affirmative defenses in turn.

3       a. *Insufficiently Pleaded: Affirmative Defenses Five and Eight Through*  
4 *Eleven*

5       These affirmative defenses are, respectively, "unclean hands," "laches, waiver,  
6 and/or estoppel," "statute of limitations," "setoff and/or recoupment," and "all matters  
7 asserted herein as counterclaims are raised as defenses." (Ans. ¶¶ 84, 87-90.) Even  
8 considering the factual allegations in Thomas Family's answer and counterclaim, these  
9 defenses are not "articulated to such a degree that the plaintiff is not subject to unfair  
10 surprise." *J & J Sports Prods., Inc. v. Delgado*, No. 1:12-CV-001945-LJO, 2013 WL  
11 3288564, at \*5 (E.D. Cal. June 28, 2013). For example, Thomas Family's statute of  
12 limitations defense does not provide Seattlehaunts with any hint as to which statute(s) of  
13 limitations might apply and to which of the variety of federal and state law claims that  
14 Seattlehaunts asserts against Thomas Family in this lawsuit—claims which are no doubt  
15 governed by different limitations periods. *See, e.g., Rosen v. Masterpiece Mktg. Grp.,*  
16 *LLC*, 222 F. Supp. 3d 793, 804 (C.D. Cal. 2016) (striking a statute of limitations defense  
17 on similar grounds). In an amended answer, Thomas family must allege, at a minimum,  
18 which statute(s) of limitations it is relying upon, what cause(s) of action are barred, the  
19 date after which such bar became effective, and some factual allegations concerning why  
20 the limitations period has expired. Similarly, Thomas family must allege, at a minimum,  
21 which causes of action its "unclean hands" and "laches, waiver, and/or estoppel" defense  
22 apply to, and some factual allegations concerning these defenses.

1       b. *Sufficiently Pleading: First through Fourth, Sixth, and Seventh Affirmative*  
2       *Defenses:*

3       These affirmative defenses are, respectively, “invalid copyright,” “fraud on

4       copyright office,” “innocent infringement,” “common source,” and “lack of originality.”

5       (Ans. ¶¶ 80-83, 85, 86.) These affirmative defenses relate to Seattlehaunts’ copyright

6       claims and are supported by factual allegations in the answer and counterclaim that are

7       sufficient to provide Seattlehaunts fair notice. *See, e.g., Tyco Fire Prod. LP v. Victaulic*

8       *Co.*, 777 F. Supp. 2d 893, 903 (E.D. Pa. 2011). (“In some cases, merely pleading the

9       name of an affirmative defense is sufficient.”) *J & J Sports Prods., Inc. v. Delgado*, No.

10       1:12-CV-001945-LJO, 2013 WL 3288564, at \*5 (E.D. Cal. June 28, 2013). For example,

11       with respect to the invalidity defense, there is no question based on the parties’ pleadings

12       that the copyright registration at issue is Seattlehaunts’ registration of the Revised

13       Wondell Graphic. (See generally Ans.) By pleading invalidity as an affirmative defense,

14       Thomas Family places Seattlehaunts on notice that it anticipates defending Seattlehaunts’

15       copyright infringement claims on invalidity grounds. Similarly, Thomas Family’s “lack

16       of originality” defense is supported by specific factual allegations that the Revised

17       Wondell Graphic that Seattlehaunts registered was based directly on the Original

18       Wondell Graphic, and before that, the Hook Graphic. These defenses and the

19       corresponding factual allegations provide enough information that Seattlehaunts is not

20       subject to unfair surprise. Therefore, the court DENIES Seattlehaunts’ motion to strike

21       with respect to these affirmative defenses.

22       //

1      **C. Mr. Wondell's Motion**

2            In addition to moving to dismiss Thomas Family's civil conspiracy claim on  
3            preemption grounds, Mr. Wondell also moves to dismiss Thomas Family's claims against  
4            him for copyright infringement and contributory infringement on the ground that Thomas  
5            Family has not received registration of the copyright pursuant to 17 U.S.C. § 411(a).

6            Section 411(a) provides that "no civil action for infringement of the copyright in  
7            any United States work shall be instituted until . . . registration of the copyright claim has  
8            been made in accordance with this title." 17 U.S.C. § 411(a). There was previously a  
9            circuit split as to whether registration "has been made" in accordance with § 411(a) as  
10            soon as the claimant delivers the required application, copies of the work, and fee to the  
11            Copyright Office (the "application approach"); or only after the Copyright Office reviews  
12            and registers the copyright (the "registration approach"). *Fourth Estate Public Benefit*  
13            Corp. v. Wall-Street.com, LLC, et al., ---U.S.---, 139 S. Ct. 881, 886 (2019). However,  
14            the Supreme Court resolved the circuit split in favor of the registration approach. *See id.*  
15            at 892.

16            Here, Mr. Wondell contends that Thomas Family has not alleged that it possesses  
17            a copyright registration for the Hook Graphic, which is the basis for Thomas Family's  
18            infringement claims against Mr. Wondell. (See Wondell Mot. at 9 (citing Countercl.  
19            ¶¶ 87-88 (alleging that "copyright protection exists" for the Hook Graphic, and that the  
20            Revised Wondell Graphic "was based on, copied, and is substantially similar to" the  
21            Hook Graphic).) In response, Thomas Family argues that Section 411(a) "do[es] not  
22            require a counterclaimant to register [a] copyright before seeking relief as to the same

1 copyright which was already put at issue in the action by the Plaintiff registrant.” (Resp.  
2 to Wondell Mot. at 8.) Thomas Family contends that Section 411(a) requires registration  
3 before a “civil action” for copyright infringement is “instituted,” and that here, the action  
4 was already instituted when Seattlehaunts filed its lawsuit. (*Id.* at 9-10.) Thomas Family  
5 concedes that it has not applied for or received a copyright registration for the Hook  
6 Graphic. Therefore, the question before the court is whether counterclaimants or third-  
7 party claimants must meet Section 411(a)’s registration requirement before bringing an  
8 infringement counterclaim. The court concludes that it does.

9         In *Fourth Estate*, the Supreme Court described Section 411(a)’s registration  
10 requirement “as akin to an administrative exhaustion requirement that the owner must  
11 satisfy before suing to enforce ownership rights.” 139 S. Ct. at 887. The Ninth Circuit  
12 Court of Appeals has further described it as “an element of an infringement claim.”  
13 *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 988 (9th Cir. 2017). Thomas  
14 Family points to a single case in which a court declined to dismiss an infringement claim  
15 for failure to strictly comply with Section 411(a)’s registration requirement. (See Resp.  
16 to Wondell Mot. at 10-11 (citing *Strobel v. Rusch*, 431 F. Supp. 3d 1315, 1328 (D.N.M.  
17 2020).) In that case, the defendants obtained copyright registration and subsequently  
18 filed amended counterclaims. (*Id.*) The *Strobel* court noted that the plaintiffs failed to  
19 cite any authority to support the argument that the defendants’ “late registration” and  
20 “subsequent filing” of amended counterclaims failed to cure defendants’ prior failure to  
21 comply with the registration requirement. (*Id.*) *Strobel*, however, runs contrary to  
22 Thomas Family’s argument. That case was about whether to excuse the requirement.

1 Nothing in *Strobel* suggests that the requirement simply does not exist for  
2 counterclaimants.

3 In fact, in *Strobel*, as well as in related cases, courts excuse the requirement only  
4 in circumstances in which registration had been made at the time the infringement claim  
5 is challenged. *See, e.g., Schmidt v. Baldy*, No. CV169368DSFAGRX, 2019 WL  
6 8219486, at \*1 (C.D. Cal. June 11, 2019); *VHT, Inc. v. Zillow Grp., Inc.*, No.  
7 C15-1096JLR, 2020 WL 2307492, at \*10 (W.D. Wash. May 8, 2020) (excusing strict  
8 compliance with the registration requirement where compliance was challenged after a  
9 trial on the merits, a final judgment, an appeal, and a remand, and where the challenged  
10 party obtained registration prior to the challenge). Here, in contrast, Thomas Family does  
11 not even allege that it has *applied* for copyright registration for the allegedly infringed  
12 work, let alone that it obtained such registration. Under these circumstances, the court  
13 cannot excuse compliance.

14 Because Thomas Family has failed to allege that it meets the registration  
15 requirement, the court GRANTS Mr. Wondell's motion to dismiss Thomas Family's  
16 claims for infringement and contributory infringement. This dismissal, however, is  
17 without prejudice to Thomas Family refiling its infringement claims, if appropriate, once  
18 it has obtained registration.

19 **IV. CONCLUSION**

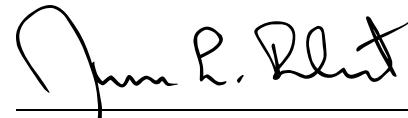
20 For the foregoing reasons, the court GRANTS in part and DENIES in part  
21 Seattlehaunts' motion (Dkt. # 22). Specifically, the court (1) DISMISSES with prejudice  
22 Thomas Family's counterclaim against Seattlehaunts for civil conspiracy; (2)

1 DISMISSES Thomas Family's counterclaims against Seattlehaunts for fraud, negligent  
2 misrepresentation, and breach of fiduciary duty, but with leave to amend to correct the  
3 deficiencies identified in this order; and (2) STRIKES Thomas Family's fifth, eighth,  
4 ninth, tenth, and eleventh affirmative defenses (Ans. ¶¶ 84, 87-90), but with leave to  
5 amend to correct the deficiencies identified in this order.

6 Further, the court GRANTS Mr. Wondell's motion (Dkt. # 23) and (1)  
7 DISMISSES with prejudice Thomas Family's third-party claim against Mr. Wondell for  
8 civil conspiracy; and (2) DISMISSES without prejudice Thomas Family's third-party  
9 claims against Mr. Wondell for copyright infringement and contributory infringement.

10 Thomas Family shall file an amended answer and counterclaim that corrects the  
11 deficiencies identified herein withing fourteen (14) days of the date of this order.

12 Dated this 11th day of September, 2020.

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14   
15

16 JAMES L. ROBART  
17 United States District Judge  
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